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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Landworks Creations, LLC,)	
Plaintiff,)	
)	
)	
vs.)	Case No. 05cv40072-FDS
)	
)	
United States Fidelity and)	
Guaranty Company,)	
Defendant.)	

BEFORE: The Honorable F. Dennis Saylor, IV

Pretrial Conference

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
May 8, 2008

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399
Mechanical Steno - Transcript by Computer

1 APPEARANCES:

2 Robert N. Meltzer, Esquire
3 P.O. Box 1459
4 Framingham, Massachusetts 01701
5 for the Plaintiff

6 Hermes, Netburn, O'Connor & Spearing
7 by Peter G. Hermes, Esquire
8 265 Franklin Street
9 7th Floor
10 Boston, Massachusetts 02110
11 for the Defendant United States Fidelity and Guaranty Company
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P R O C E E D I N G S

THE CLERK: All rise.

Court is now open. You may be seated.

Case No. 05-40072, Landworks Creations versus United States Fidelity & Guaranty Company.

Counsel, please note your appearance for the record.

MR. MELTZER: Good afternoon, your Honor, Rob Meltzer for the plaintiff, Landworks Creations, LLC.

THE COURT: Good afternoon.

MR. HERMES: Good afternoon, your Honor. Peter Hermes for the defendant, United States Fidelity & Guaranty Company.

THE COURT: All right. Good afternoon.

All right. This is a pretrial conference in this case. We have four pending motions in limine plus the issue of a -- a jury trial.

Let me -- well, let me start with the most basic issue of all. Are we really going to go to trial for a week or two in this case given the relatively small amount of money at stake?

Mr. Meltzer.

MR. MELTZER: Well, I believe there has been no offer to settle the case. I believe we have to try the case.

THE COURT: Mr. Hermes.

MR. HERMES: Your Honor, the evidence in support of

1 the counterclaim is that it's multiples of the plaintiff's
2 complaint. If the multiple -- if the plaintiff wishes to
3 dismiss its complaint, I will take that offer to my client and
4 see whether it will drop its counterclaim.

5 THE COURT: All right. I'm not going to insert any
6 time or energy on that if you're not even speaking to one
7 another, but let me then start with, I guess, what are some
8 obvious points, at least from my -- from my standpoint.

9 This is basically a breach of contract claim with a
10 Chapter 93A claim appended.

11 Mr. Hermes, are there other claims in the case at this
12 stage? I've lost track of them.

13 MR. HERMES: No, there are not, your Honor. The only
14 two remaining counts are Count II for breach of contract and
15 Count VI with respect to Chapter 93A. The other claims against
16 USF & G were handled by the motion for summary judgment. I
17 believe it was towards the end of March or --

18 THE COURT: All right. So we have a breach of
19 contract by Landworks essentially for failure to be paid and a
20 counterclaim breach of contract alleging that the construction
21 work was defective. I mean, again, I'm grossly simplifying,
22 but that's --

23 MR. HERMES: That's essentially it, yes, your Honor.

24 THE COURT: All right. All right. It seems to me
25 reasonably clear that both parties are entitled to a jury

1 trial, so we will impanel a jury on the breach of contract
2 claims.

3 The Chapter 93A claim will be tried to the court, that
4 is, to me, and I am not going to admit testimony at the trial
5 that relates only to a 93A claim; for example, evidence of a
6 failure to settle, for example, or an alleged improper
7 insurance practice.

8 I'm expressing no opinion about whether -- what that
9 evidence ought to look like, but I think it would be unduly
10 prejudicial to the trial of the other claims to have the jury
11 see or hear whatever that evidence is.

12 One of the things that the parties are contesting and
13 that I'm having trouble understanding, and I think my question
14 is directed to you, Mr. Meltzer, is this: It seems to me that
15 this is a breach of contract claim, and like any other breach
16 of contract claim, you have issues about what the contract
17 means, whether the contract was breached one way or the other,
18 either because Landworks wasn't paid, or Landworks performed
19 inferior work, or walked off the job, or what have you, but
20 it's a contract, and the scope of the contract is determined by
21 its language. Sometimes contracts can be modified after
22 they're entered into, or they may be ambiguous, and a course of
23 performance might explain an ambiguity, but I'm having trouble
24 understanding what -- why all of this evidence of industry
25 practice and custom is relevant. I don't see what it's

1 relevant to.

2 You could have an industry practice and custom in
3 every construction job in United States other than this one,
4 and if the contract said something different, you're
5 going to -- we're going to try this case on the contract, not
6 based on what other people in other jobs are doing. I don't
7 get it.

8 MR. MELTZER: Your Honor, what this is, the -- the
9 underlying count, Landworks versus USF & G, is an extremely
10 simple case. The amount of evidence and the witnesses on our
11 case in chief is really de minimis. It's a very
12 straightforward case. The reason this case gets complicated is
13 that USF & G has taken a position contrary to the Framingham
14 Heavy Equipment case in 2004.

15 THE COURT: Let me -- let me -- let me stop there. I
16 read Framingham Heavy Equipment, and I think it's a pretty
17 unremarkable case in the sense that it just says, with some
18 wrinkles, if you aren't paid, you don't have to keep working.
19 If you're not being paid, that's a breach.

20 MR. MELTZER: It -- it was, your Honor. It was a
21 remarkable case, in fact, the Zilioli family is one of my
22 clients out of Framingham, but that case was incredibly
23 significant. It was prior to that, 2004. It was not settled
24 and had never been adjudicated whether an excavator, which is
25 not a filed sub bidder on a public job, is subject to the same

1 ability to leave the job when or not he is paid. Up until that
2 time there was an exception that the public good required the
3 subcontractors to go out and continue to work until it was
4 bankrupt. So that case was an incredibly significant case,
5 because it expanded not only to nonfiled subs, but it also
6 spanned into the public context. The case was incredibly
7 important.

8 The problem we have here is that they have argued, not
9 withstanding Framingham Heavy Equipment, that this is
10 abandonment, which was what was foreclosed by Framingham Heavy
11 Equipment. We demonstrated that the work was done; and in
12 fact, the work was done appropriately, and they're entitled to
13 the payment of it, and they are not being paid. Under
14 Framingham Heavy Equipment, it is not abandonment to actually
15 leave the job. In fact, the obligations are terminated. What
16 makes this case a little strange is that in 2005, when all of
17 these companies were collapsing, USF & G had adopted that
18 policy and that position that you don't go back to work until
19 you are paid.

20 So if they were to raise the issue of abandonment, we
21 have a right to demonstrate that even USF & G did not view this
22 as abandonment. This is how they handled these cases, hundreds
23 of these cases. All we've asked is to do three cases from the
24 same time frame that contradicts the e-mails and documents that
25 were sent to my client from Lovett-Silverman to USF & G as to

1 why they are not allowing him back on the job. It goes to the
2 heart of the case, because if there is no abandonment, there's
3 also no counterclaim. And they can't, on the one hand, engage
4 in certain behavior that obviates abandonment and then turn
5 around and say, well, now also you're still responsible under
6 the contract. The contract in this case is a ratification
7 agreement that refers to the prior standing contracts. It's
8 silent on those issues. So the industry practice as to how
9 these claims are handled and being determined, which is for
10 resolving the issue of abandonment.

11 THE COURT: I don't -- there may be an issue lurking
12 here on 93A, and let me take that off the table for now,
13 because I'm not going to resolve that issue now, but on a
14 contract claim, what they did with other subcontractors or in
15 other construction projects, it seems to me, is not relevant.

16 MR. MELTZER: Your Honor, it is absolutely, because
17 the reality is that what Landworks does, and this is why it is
18 relevant. Landworks looks at what USF & G has done
19 systemically in 2005 and says, oh, that's what USF & G does.
20 They don't want us here. For them to be able to argue that
21 this is abandonment without Landworks being able to put in
22 testimony that says this is not abandonment, and they know it,
23 because it's their own policy takes the entire case out of
24 context in what was happening during this time frame. This is
25 their behavior. This is the same time frame, Jackson, USF & G.

1 It's Vertex, and the jury needs to understand, because my
2 client is going to have to testify, well, of course, during
3 that time frame, I did not going back when I wasn't being paid.
4 That was the expectation. The expectation is created by
5 USF & G.

6 THE COURT: No, no, no, no, they don't -- the right or
7 lack of right is created by the contract. You -- I don't
8 understand this -- this idea that we're getting off the
9 contract. Now, in the abstract, again without getting into the
10 details, it seems to me that you would be entitled to a jury
11 instruction based on Framingham Heavy Equipment that says, in
12 substance, if you're not being paid, you have a right to walk
13 off the job --

14 MR. MELTZER: And -- and in this instance --

15 THE COURT: -- and the jury can so find.

16 MR. MELTZER: Now, because if they're relying
17 specifically on USF & G's interpretation of Framingham Heavy
18 Equipment, it's more than a jury instruction.

19 THE COURT: It's not -- it's not their interpretation
20 of the law. It's what does the contract say; and if the
21 contract is ambiguous in some way, ambiguities, issues are then
22 for the court to resolve, not for the jury to resolve, at least
23 in the first instance.

24 I mean, as I understand your position, you say
25 something like this: The contract says Landworks shall do A

1 through T. Landworks gets part way through the job, it does A
2 through K. They've only been paid A through F, and they, you
3 know, again, gross oversimplifying, they say, "I'm not coming
4 back until I'm paid," and the -- you know, as I understand
5 Framingham Heavy Equipment, they have the right to do that,
6 again putting aside whatever particular wrinkles may be in the
7 contractual language.

8 MR. MELTZER: But where -- I mean it's the issue of
9 the defense. We're saying that the defendant cannot argue
10 abandonment when it's contrary to the message it sends to the
11 community.

12 THE COURT: What case supports that? I don't get
13 that. Contracts are not decided on messages to the community.
14 It's what does the language of the contract say. The rights of
15 Landworks --

16 MR. MELTZER: Actually, your Honor --

17 THE COURT: -- and USF & G are totally bound up in the
18 contractual obligations.

19 MR. MELTZER: Well, it's 176D, and that's where the
20 overlap is, because what 176D says is that USF & G must have a
21 policy and practice for adjudicating claims. They admit it in
22 their testimony they did not have one, and so the question is
23 when you have a bond claim, what Landworks is saying is: How
24 do I make this claim. And we're saying that they relied upon
25 what this same group of people did. It would be absurd to

1 suggest that in the absence of a policy they are allowed to
2 simply say, well, in this case we're following this, and in
3 this case it's abandonment.

4 THE COURT: But isn't that a failure to settle a
5 claim; in other words, a 176D claim is like a 93A claim; isn't
6 for me to decide as the court, and we could have a hearing
7 after the trial about those issues? Why does the jury hear
8 that? What's in the contract?

9 MR. MELTZER: It is our response to abandonment that
10 even they don't consider it abandonment. And it is important
11 that they -- that their conduct consistent, showing this is not
12 abandonment, is absolutely relevant, because it is the context
13 of an industry in collapse.

14 In 2005, this is the message USF & G is sending. This
15 is what we expect. This is what we want you to do. And if
16 language has relied on that, as it has to remove that context,
17 to apprise the jury of understanding the mind-set of Landworks,
18 they're not just following the law. They are not abandoning
19 the project, because what they have done has been deemed by
20 USF & G not to be abandonment. In that time frame, with
21 Jackson, it is absolutely germane to their mind set.

22 THE COURT: Putting that in terms of the law of
23 contracts, because that's what we are talking about here,
24 what -- what principal of contract law permits that evidence to
25 come into the trial?

1 MR. MELTZER: Your Honor, we're saying that if they're
2 putting in a defense of abandonment, and they're interpreting
3 my client as abandonment --

4 THE COURT: Well, wait a minute. The defense of
5 abandonment, they're saying that a material breach, right, that
6 the contract was materially breached, because Landworks walked
7 off the job and didn't finish, right? That's essentially what
8 they're saying?

9 MR. MELTZER: That is contrary to Framingham Heavy
10 Equipment and their own pattern and practice of behavior in
11 their own way of adjudicating the claims. This is what they
12 did. This is how that worked.

13 MR. HERMES: Your Honor --

14 THE COURT: Yes.

15 MR. HERMES: -- at some point, I would like the
16 opportunity to present my client's view of what his claims are,
17 as opposed to the distortion by plaintiff's counsel.

18 THE COURT: All right. Why don't you do so.

19 MR. HERMES: First, your Honor, as your Honor found in
20 the summary judgment decision, it was in the fall of 2004 that
21 Landworks left this job. So events of 2005 are irrelevant to
22 whether or not when it left it either was in effect suspending
23 for nonpayment, or it determined to leave, because it couldn't
24 complete the remaining work that it had under its subcontract
25 for the remaining subcontract balance and decided to get off

1 the job, rather than spend vastly more money completing its
2 contract than it was to receive.

3 THE COURT: But I think there's a third issue floating
4 around is whether they took the winter off and couldn't do the
5 work in the winter, but --

6 MR. HERMES: All right. Also, your Honor, the
7 plaintiff's own claim is that the balance remaining on the
8 contract was \$160,000, but that it gives a credit of \$25,000
9 for incomplete work. So, it can only recover what you had, in
10 fact, done. So, there are two issues.

11 Let's assume that the plaintiff in the fall of 2004
12 properly suspended for nonpayment. It still can only recover
13 the fair value of the work it, in fact, performed. And if the
14 value of the work it did not perform was more than \$25,000,
15 then concomitantly, the 135 it claims is reduced by that fair
16 value. That's number one.

17 Number two, if the court should happen or the trier of
18 facts should happen to find that the reason they left was that
19 they had done basically defective work, as defined by the
20 landscape architect on the job, then there is a claim over, not
21 only for the reduction in the amount of work that they -- for
22 the value of work they're not entitled to, because they didn't
23 do it, but the fair value of collecting all -- correcting all
24 of the defective work.

25 And so, either way, the value of the incomplete work

1 is a fact issue in this case, as well as whether there was
2 abandonment or not or suspension for nonpayment or not.

3 To direct myself to the issue of Landworks somehow
4 relying on some conduct of USF & G in 2005, of course, as I
5 just said, Landworks was off the job; and Mr. Matthews, the
6 president of Landworks, was asked at his deposition what his
7 experience had been going through the relent process, and so
8 this was your first experience in going through this process
9 working with a surety and the ratification or nonratification
10 of a contract. Yes, except we went through it twice on this
11 project, because of the Standen Jackson issue. So, Landworks
12 had no expectation of what a relent was about, because
13 Landworks had never been through one. The contract claim is
14 precisely as your Honor suggests it is. My client's position
15 is that we relate largely to, first of all, what does the money
16 do under the contract. There are some extras in dispute. Then
17 because the work admittedly was not complete, what's the value
18 of the incomplete work; and therefore, the credit that is
19 deducted from the remaining contract balance. That's what the
20 contract claim is about, your Honor. It has nothing to do with
21 the rest of it. Your Honor is correct that -- that if the
22 reason that USF & G refused to pay has something to do with
23 some -- I won't say improper motive, but some violation of duty
24 it owed under 176D or 93A, then -- and motive is relevant
25 perhaps to not necessarily the damages caused, but possibly

1 multiple damages, possibly, that's for the court to determine
2 if we get there; but on the contract case, your Honor, if the
3 court determines that, in fact, as the case law indicates, even
4 if USF & G was wrong in its judgment that it was entitled to a
5 larger credit, if it had evidence with respect to a difference
6 in value, then a near fuss over whether something is owed under
7 a contract is not a violation of Chapter 93A. It's simply your
8 dispute over a contract that gets resolved by the court.

9 Also, I believe Mr. Meltzer has now said this is a
10 claim on the ratification agreements. That is the contract
11 between USF & G and Landworks. It has various terms, and it
12 also has terms in it that says that under certain circumstances
13 it will be handed off to a completing contractor, Jackson, and
14 then there are certain things that follow from that. I just
15 make the point here, your Honor, this is a claim on a
16 ratification agreement. There is no claim on an insurance
17 policy, and 176D goes out the window.

18 THE COURT: All right. I -- I -- I --

19 MR. MELTZER: Your Honor, may I just respond to two
20 points?

21 THE COURT: Yes.

22 MR. MELTZER: Landworks is on the job from January
23 2005. They did not -- they were not off the job in the fall of
24 2004, and there certainly has been substantial testimony, and
25 there will be testimony that they were on the job in 2005.

1 Second, this is a contract between Landworks and
2 USF & G. It is absolutely a 176D claim.

3 Your Honor, in terms of the -- I think what troubles
4 me is that there have been misrepresentations about the facts
5 here. This is a \$25,000 credit for specific work asked for,
6 and then some employee at that point told them they didn't need
7 to do it. This is not a contract.

8 This is a situation in which Landworks is being asked
9 by the surety to do certain things to help get this job done,
10 and those practices, how that worked that said, well, let's get
11 this done, this is how USF & G does this is a germane issue to
12 why Landworks behaved as it did; and if it knew that other
13 cases were happening in another vein, that is admissible, and
14 it is relevant, and it is necessary.

15 THE COURT: I -- I'm -- I don't see any case law in
16 your filing to support that. I'm having trouble understanding
17 it. I mean, let's say, for example, that USF & G had 95
18 construction projects around the country, or around
19 Massachusetts, and it handled 94 of them one way, waiving its
20 contractual rights, or something similar, but decided in one
21 instance to stick by its contract.

22 Don't they have the right to do that? I mean --

23 MR. MELTZER: No, they can't. That's a violation of
24 176D.

25 THE COURT: All right. Let's put that aside then.

1 What is going to be tried to the jury? The jury is not going
2 to hear about unfair insurance practices.

3 MR. MELTZER: No, what the jury is going to hear about
4 is that at that time that the practice was that the signing of
5 a ratification agreement or filing of a lawsuit prior to did
6 not preclude somebody from coming to finish the job, did not
7 constitutes abandonment. These projects that I want to
8 introduce are situations where a lawsuit is filed, then the
9 ratification, the work done, case resolved. And
10 however -- what you have in this case is there is e-mail
11 traffic back and forth where it's being told to Landworks, oh,
12 you filed a lawsuit. That's now -- that now terminates your
13 agreement, and we can't move forward. That's not how they
14 behave, and we're saying that Landworks had a right to expect
15 that in the absence of a policy on completing performance, and
16 not the claim, but the performance bond, he had a right to rely
17 on what everyone else in the industry was being treated as in
18 the same way to act accordingly.

19 THE COURT: Do you have a case that supports that
20 proposition?

21 MR. MELTZER: Your Honor, generally how is my defense
22 for abandonment. Why is it not abandonment. It's a state of
23 mind. This is what they are doing.

24 THE COURT: State of mind is -- is not -- it may be
25 admissible under 93A or a 176D case, but it's not admissible in

1 a breach of contract. The question is what does the contract
2 says, and was there performance or not, right?

3 That's -- just -- just a moment.

4 (The court conferred with the law clerks.)

5 MR. MELTZER: Your Honor, if I may.

6 THE COURT: Yes.

7 MR. MELTZER: Vertex is listed on their pretrial.
8 They are the consultant that actually is the -- is a relevant
9 witness to this entire issue. They've identified them, too.
10 I've said that --

11 THE COURT: I'm sorry. Hold on. Hold on. I want to
12 come to closure on this.

13 The bottom line is is that a party to a contract has
14 the right to enforce the contract, and the party is not bound
15 by what it did on other contracts. It may be the circumstance
16 that there is some Chapter 93/176D angle on this that requires
17 a different result in that context, and it could be that you're
18 liable for 176D, even though you're not liable on the contract,
19 but the fact of the matter is -- I mean, to use an analogy, I
20 have a contract that requires me to make a mortgage payment
21 every month to my mortgage lender. If I hear or understand
22 that my mortgage lender frequently lets people skip a payment
23 around Christmastime, because they want everyone to be filled
24 with holiday cheer, and I decide not to make my mortgage
25 payment, they could still come after me for that mortgage. I

1 am contractually obligated to file -- to make that payment.

2 MR. MELTZER: It's a different analogy.

3 THE COURT: I can't say -- I can't say later, oh, by
4 the way, I heard that in Maryland you were, you know, letting
5 people get away without paying their mortgages.

6 MR. MELTZER: It's the other way around, your Honor.
7 This is for the convenience of USF & G, because the
8 subcontractor has to get that bond claim filed under the
9 statute, and so they're using abandonment as a, quote, a shield
10 and a sword; and you're telling me, and you're asking me, that
11 I'm not allowed to defend against that what they did for their
12 convenience that my client relied on. That's the issue.

13 THE COURT: I'm telling you that if it's contract
14 claim, we're going to try it as a contract claim; and if there
15 is 176D claim/93A claim, we're going to try that. It could be
16 that the peculiar way in which an insurer defends its
17 contractual rights might constitute a 176D violation. I'm
18 saying that off the top of my head. I don't know. At least I
19 can conceive of a circumstance like that. But as a matter of
20 contract claim, what they did on -- with other subcontractors
21 and other construction projects, other contracts, is not
22 relevant to a contract claim in this case.

23 And so, to that extent, I'm going to grant the motion
24 to limit testimony under Counts I and IV; that is, I'm not
25 going to admit in the jury trial testimony concerning other

1 construction projects, other subcontractor lawsuits, other
2 subcontractor situations, USF & G's claim against Jackson, or
3 anything of the sort. Any claim concerning USF & G's failure
4 to settle or its behavior generally, either under 93A or 176D
5 will be tried to the court; and if there is additional evidence
6 that's relevant on that claim, we'll take it up once the
7 contract claim is concluded.

8 There's also -- part of that motion is to bar the
9 testimony of Frias Concrete, and I understand that there's a
10 dispute there about whether Landworks was responsible for the
11 concrete work; is that right, on the site?

12 MR. MELTZER: Actually, your Honor, for a substantial
13 number, we list it on our -- on our witness list, a number of
14 subcontractors, who had responsibility for big portions of the
15 site work, and yes, they would be -- they have testified that
16 this was their work, not Landworks' work. I can't imagine why
17 that wouldn't be relevant. We're being told that we're
18 responsible for that work, and certainly other people under
19 contract do it. That's not Landworks' responsibility.

20 THE COURT: Well, again, I'm thinking out loud here.
21 There is a dispute apparently about the scope of the contract,
22 which suggests to me that there is at least a potential issue
23 of ambiguity. Either the contract is ambiguous, or it's not.
24 If it is ambiguous, arguably the evidence might be relevant.
25 For example, if it simply said concrete work without any

1 further specification, it might be the subject of -- of
2 testimony; but if it said Landworks shall pour the concrete
3 foundation for the flagpole and nothing else then, you know,
4 it's not ambiguous, but I'm not sure I can decide that as I sit
5 here.

6 Mr. Hermes, what is your position on this issue as to
7 the scope of the contract, that is, that there are apparently
8 disputes as to what Landworks was responsible for under the
9 contract?

10 MR. HERMES: Your Honor, the scope of the -- of the
11 words within the contract is for the interpretation by the
12 court and to instruct the jury as to what the contract means.
13 There can be circumstances, I will admit, in which a court
14 might seek to listen to evidence even in the case of not true
15 ambiguity, and so I can't say that if you talk about the -- the
16 head walls, for instance, I mean it may be that the court would
17 determine that Section 2200 -- for instance, it's not 2200, but
18 I will use it by way of example, contains within the contract
19 the head walls and the subcontract and old agreement say that
20 Landworks will do the head walls. There might be an issue as
21 to what a head wall is, for instance, and the court might have
22 assistance from other evidence with respect to that.

23 Without knowing the precise context in which it comes
24 out, it's difficult for me to say that there is a clear bright
25 line one way or the other, your Honor, other than to point the

1 court to the basic rules, which the court knows.

2 THE COURT: All right. All right. I'm going to have
3 to refresh my memory on the role of the court and the jury with
4 regard to alleged ambiguities on the contract. So, to that
5 extent, I'm going to hold off, that is, this dispute as to the
6 scope of Landworks' obligations under the contract and what
7 evidence might be admissible in that regard.

8 MR. HERMES: May I offer some assistance there, your
9 Honor?

10 THE COURT: Yes.

11 MR. HERMES: There is a case called Eagle Pitcher of
12 Judge Zobel, Rya Zobel, of probably 25 or 30 years ago. It was
13 an insurance coverage case, and Judge Zobel said even though
14 there isn't true ambiguity, because it's a complex area, I can
15 listen to extrinsic evidence. I am not suggesting that this is
16 a very bright line test. If the court has an issue, which it
17 thinks evidence is helpful, even though it's not strictly a
18 case of ambiguity, because it's a case of a term of art, for
19 instance.

20 THE COURT: All right. There is also perhaps an
21 intertwined issue of subsequent modification by course of
22 performance or otherwise. I mean a contractor does not appear
23 to be ambiguous, for example, if there were testimony that -- I
24 don't even know who the right party is, USF & G/Standen/Jackson,
25 someone said, oh, you don't need to do that concrete work,

1 that's outside the scope of your contract. It might be a
2 modification as well as an interpretation.

3 MR. HERMES: Admittedly so, your Honor, or someone may
4 come in and say they, in fact, did it perhaps. I mean --

5 THE COURT: Right.

6 MR. HERMES: -- the parameters here are a little bit
7 difficult to talk about without having specific evidence before
8 the court on a given issue.

9 THE COURT: All right. I'm going to hold that ruling
10 in abeyance for the time being.

11 Let me take up next this question. Mr. Hermes says a
12 motion or USF & G has a motion to preclude evidence that more
13 than \$42,000 is due. That's based on the existence of a -- or
14 the claimed existence of a hold agreement, which I think
15 Landworks is disputing, among other things, that there's no
16 consideration for that agreement.

17 Mr. Hermes, let me hear you first.

18 MR. HERMES: I think not, your Honor, I believe
19 earlier in this hearing, Mr. Meltzer said the contract is
20 the -- I used the term whole, but he said the contract is the
21 ratification agreement or the ratification contract. I am
22 referring to the document that was executed between USF & G and
23 Landworks under which Landworks agreed to come back after the
24 default by Standen, and Landworks agreed to perform its
25 subcontract work and under which it immediately received

1 payment from USF & G of approximately \$177,000.

2 That contract contains a release of all prior claims,
3 except a release with respect to \$32,000 of retainage. There
4 is an asterisk that identifies a \$9,864 disputed change order
5 to be sorted out, and then it contains a provision that says
6 Landworks agrees that it will do work for USF & G or a
7 completing contractor subject to the approval of the completing
8 contractor. That agreement was signed by the parties in March
9 of 2004.

10 There is a subcontract with Jackson Construction
11 Company in April of 2004, your Honor, under -- it was signed by
12 Mr. Matthews, of Landworks, under which he then proceeded to do
13 work on out and, in fact, submitted change orders to and
14 accepted payments from Jackson.

15 And so, if the claim is on the ratification agreement,
16 the ratification agreement also, as I said, contains a partial
17 release. There are only certain things deemed to be
18 recoverable under the ratification agreement. I suppose
19 there's a third one. One is the retainage; one is \$9,864,
20 which is stated as an exception; and possibly if Landworks can
21 prove that it did work between March of 2004 and April of 2004,
22 the effective date of the Jackson subcontract there might be a
23 claim in there for that additional amount. It's not clear to
24 me how when Landworks executes the subcontract with Jackson,
25 goes to work for Jackson, submits its bills to Jackson,

1 negotiates change orders with Jackson, and accepts payments
2 that it then has a claim on the preexisting -- it's essentially
3 a novation here, your Honor.

4 THE COURT: What's the consideration for the release
5 in that ratification agreement?

6 I mean I think the law is you can't --

7 MR. HERMES: The consideration for -- the execution of
8 the Jackson subcontract, the ratification agreement, the
9 agreement of Landworks in the ratification agreement was to
10 accept certain money, return and complete the work for an
11 identified completing contractor. So the consideration was the
12 payment of \$177,000 paid by USF & G to procure Landworks'
13 agreement to return and to perform for the completing
14 contractor, which in this case was Jackson Construction
15 Company.

16 THE COURT: But if -- I mean if you have a contract in
17 which you -- the contractor agrees to pay the sub \$100,000.
18 The sub isn't paid. The sub walks off the job. If there's a
19 ratification agreement or a new agreement that says we'll pay
20 you \$100,000 to finish the job, and by the way, release claims
21 against us, there's no consideration for that release, right,
22 because they have the contractual obligation to pay them
23 \$100,000 anyway?

24 MR. HERMES: I don't believe that's the law of the
25 Commonwealth of Massachusetts particularly when you're dealing

1 with issues of dispute. Change orders at the time of the
2 payment over a certain amount is disclosed. The ratification
3 agreement contains an agreed-upon statement of the subcontract
4 account liquidating various change orders as of that date, and
5 one of the obligations that Standen assumed for the execution
6 of that agreement was the obligation to work for the completing
7 contractor.

8 Keep in mind, your Honor, if as a matter of law when
9 Standen went down in the traces, that subcontract was
10 terminated. Landworks had done some amount of work as of that
11 date. It didn't have a right to continue on the job. It could
12 have sued for what it was owed as of that date, but because the
13 subcontractor relationship with Standen had been ended, there
14 was a new arrangement developed, and one of the conditions was
15 as part of the consideration given to Landworks was that it
16 would complete for a Jackson, or someone like a Jackson, and
17 it's -- and Mr. Matthews specifically was asked what did he
18 understand that provision to mean; and his statement was that
19 means I go to work for the completing contractor, but they
20 don't have to accept me, because the undertaking was Standen
21 was doing it, respective by the -- by the succeeding general
22 contractor. Jackson accepted Landworks provided Landworks
23 accepts -- signed Jackson's form of subcontract. Jackson did
24 not have to accept Landworks; and Mr. Matthews, the President
25 of Landworks, well knew that and testified to that at his

1 deposition. And so the consideration was the agreement by
2 Jackson to take Landworks on when it didn't need to do so.

3 THE COURT: But just -- this may be a detail, but
4 Landworks at that point, at the point in which Standen fails,
5 and Landworks isn't being paid, they're entitled to be paid for
6 work performed to that date. Let's assume that the work is not
7 substandard for the moment here.

8 MR. HERMES: Yes, your Honor.

9 THE COURT: They're entitled to be paid for work up to
10 that point, and they're also entitled to their profit
11 expectancy going forward; in other words, if they --

12 MR. HERMES: If -- if they had brought -- well, I'm
13 not certain that the profit expectancy is covered under -- if
14 they had brought a payment bond claim at that point, they were
15 entitled to the fair value of their work. Certainly, that was
16 done as of the date of the Standen default. They were entitled
17 to that. I think there's possibly some dispute whether they
18 would be entitled to a profit, an unearned profit element at
19 that point; but even assuming that they were, what they
20 had -- what they could not --

21 THE COURT: Just before I forget the thought. That
22 would be the normal common law contracts is that, you know,
23 you're entitled to your expectancy damages. It's possible the
24 bond is framed in a way that the bond is only -- you know, pays
25 a portion of it, and they have to look to Standen for their

1 expectancy damages.

2 MR. HERMES: Possibly. The bond contains language
3 about labor and materials provided, and so its profit part of
4 that -- persons in the position of Mr. Meltzer would argue
5 certainly. I'm -- I'm not trying to say that there's a legal
6 issue that we have to deal with in this case, but as of that
7 moment, what Landworks was entitled to was the amount that it
8 earned and maybe some expectancy. What it wasn't entitled to
9 was the unearned -- unearned balance of the subcontract price,
10 and it entered into a new agreement to do the work to earn the
11 unearned balance of the subcontract price, and it received
12 consideration for that, which was the payment of \$177,000; and
13 in the Commonwealth of Massachusetts, I believe -- I'm not
14 suggesting this was the only consideration that they received,
15 but payment of amounts that are owed, so that someone doesn't
16 have to go chase them can constitute good consideration for
17 entering into a contract.

18 The additional element in that consideration was the
19 liquidation of claims for change orders and agreement to pay
20 now without having dispute over certain change orders and the
21 agreement to try and deal with a certain outstanding change
22 order and the agreement to pay the retainage. There were
23 certain consideration given when the ratif -- what I'll now
24 refer to as the ratification agreement was signed, and one of
25 its provisions was that Landworks would complete for a

1 completed contact.

2 THE COURT: Okay. Mr. Meltzer.

3 MR. MELTZER: Yeah, except that there was no contract
4 for a completing contractor, which is where the problem begins.
5 As the documents have shown, there is no contract signed in
6 April of 2005 -- '4 between Jackson and Landworks. There is an
7 agreement between Landworks and USF & G whereby they agree to
8 return to the job for payment of monies owed to them and to
9 complete their contract work. As we've identified, and it has
10 been testified to, and it's in our brief, Landworks is
11 approached by Jackson saying, sign a contract agreement
12 with -- with Jackson and Landworks. They declined to do it in
13 April 2004.

14 In their position, they are working for USF & G. What
15 the documents show in June after they spent three months, at
16 enormous cost to Landworks, Jackson says to them, we're not
17 going to pay you anything. We're not even going to submit your
18 requisitions until you sign this form of contract. That is a
19 document that there is no consideration, because they're
20 trying -- they're saying for no due consideration, you sign
21 this document, if you want to be paid the money you've already
22 been owed. It's unconscionable. The contractor adhesion, it
23 was not supported by consideration. The monies that are being
24 sought by Landworks in this case are the disputed change order
25 of \$9,800, the retainage on the Standen contract, and the work

1 that was performed after March 2004 by Landworks for USF & G at
2 the direction of their construction manager.

3 What they're asking to do in the motion in limine is
4 to take this bogus document, which they claim is April of 2004,
5 and it is not, and to somehow or other make that binding
6 without a trial. We are asking for the value of the work
7 performed at the direction of USF & G's agent. That's it.
8 It's not that complicated. The document they're trying to
9 interpose, which complicates this is void.

10 THE COURT: Okay. Void because?

11 MR. MELTZER: There's no consideration --

12 THE COURT: Uh-huh.

13 MR. MELTZER: -- and because it's unconscionable.
14 They are holding their requisitions and saying, yes, you've
15 done this work at our request for three months; yes, you're
16 owed money, lots of money; but, oh, by the way, we're not going
17 to take these requisitions for money you did under that
18 agreement with USF & G, and we're not going to submit them
19 unless you sign a document basically surrendering substantial
20 rights. It's absolutely void. We cite it in our opposition,
21 based on -- it talks about unconscionability at the time of
22 formation. They're holding a sledge hammer to their head.
23 It's absolutely not enforceable. And so what we're looking for
24 is the work done Landworks/USF & G at the direction of their
25 construction manager.

1 THE COURT: There's something wrong with that
2 metaphor. If you hold a gun to someone's head, or you hold a
3 sledge hammer over them --

4 MR. MELTZER: I have been representing firearms
5 companies for so long, they had a problem all the time about
6 making references to holding guns over people's heads.

7 THE COURT: Here's what I am going to do. I'm going
8 to deny the motion without prejudice. I'm going to hear the
9 evidence, and we'll see how it goes in the course of the trial,
10 and there is a sufficient amount in dispute here. I don't
11 think I can decide this on a motion in limine.

12 All right. Let me take up next the motion to exclude
13 testimony of William Gallagher, which is a USF & G motion.

14 Mr. Meltzer, I did not see anywhere in the record an
15 expert report.

16 MR. MELTZER: Your Honor, the expert report, as we
17 stated in the expert disclosure, it is the affidavit of
18 Mr. Gallagher submitted in opposition to the motion for summary
19 judgment. We also provided it, essentially the same thing, in
20 the answers to interrogatories. So the report is the
21 affidavit. What the disclosure did is met the remaining
22 requirements of Rule 26 by identifying that as a report and
23 then showing the other issues of the requirements of Rule 26.

24 THE COURT: And is it your position that that
25 affidavit complies with Rule 26(e)(2)(B)?

1 MR. MELTZER: Yeah, it serves as the expert report.
2 It contained his resume, and the other course of what he says
3 are met in the expert disclosure that was provided in a
4 separate document. Yes, it does comply.

5 THE COURT: Well, the affidavit does not comply by
6 itself. I think you will agree, right? It does not include
7 everything required, for example, compensation, other cases in
8 which the witness testified, lists of all publications, things
9 of that nature, right?

10 MR. MELTZER: It -- what it does, your Honor, we have
11 that indication that compensation was in the actual expert
12 disclosure. It was a separate document. He has not testified
13 in court and does not have publications. His resume had
14 everything else.

15 THE COURT: And the time to disclose that expert
16 testimony, I believe that I set a deadline for disclosure of
17 that information; and even assuming the affidavit constitutes
18 the expert report, your supplement was filed well after the
19 deadline, correct?

20 MR. MELTZER: No, your Honor, it was not. In the
21 actual document, it was the report or the affidavit was well
22 before their summary judgment mentioned. The affidavit, which
23 is from his report, which is obviously incorporated by
24 reference in the -- in the disclosure that -- that is well
25 timed within the court's order.

1 THE COURT: I don't -- I don't get it. The rule
2 pretty clearly requires an expert report in a particular form.
3 I set a deadline. The deadline was extended, and your position
4 basically is, well, this affidavit is pretty much like an
5 expert report, and there's no harm, because we provided you
6 some of the information later.

7 MR. MELTZER: I don't understand why an affidavit on
8 which he identified the testimony and basis for it and
9 attaching his resume would not constitute an expert report.

10 THE COURT: Well, it doesn't follow a very basic rule.
11 That's one of the things I'm struggling with. I mean the
12 question -- and I think it's pretty clear you didn't follow the
13 rule.

14 MR. MELTZER: I don't believe so, your Honor. I don't
15 believe that the rule says it cannot be by affidavit.

16 THE COURT: Well, let's -- let's be a little bit
17 linear about this. Let me find the affidavit. Just a moment.

18 All right. I have the affidavit that was filed in
19 opposition to the motion for summary judgment. The -- it was
20 filed April 18, 2007; is that right? Let me double check that
21 against the docket. Yes, April 18, 2007, Docket No. 75.

22 The rule requires a written report. It's an affidavit
23 in opposition to a motion for summary judgment. The report
24 must contain a complete statement of all opinions the witness
25 will express and the bases and reasons for them. I will assume

1 for the moment that that information is there.

2 The data and other -- or other information considered
3 by the witness informing them.

4 MR. MELTZER: That's there as well.

5 THE COURT: Well, let's assume for the moment that
6 that's there. The witness's qualification, including a list of
7 all publications offered in the previous ten years. We have a
8 resume with no list of publications, a list of all other cases
9 in which the witness testified. There was no list of cases.

10 MR. MELTZER: There are none, your Honor.

11 THE COURT: A statement of the compensation to be paid
12 for the study and testimony in the case. There is no --

13 MR. MELTZER: That's actually in the separate witness
14 disclosure, which does identify his compensation.

15 THE COURT: All right. Then that separate witness
16 disclosure, let me get there. Under the -- I have on May 31st,
17 an order that expert reports would be due by July 30, '07;
18 expert depositions to be completed by September 14th.

19 Was that extended?

20 MR. HERMES: Your Honor, I believe at the time of the
21 motion for summary judgment, there was a motion the court
22 allowed to extend the time for expert reports until three weeks
23 after the court's decision on the motion for summary judgment.
24 The timing of that is, I believe, the court's decision on
25 summary judgment on the Lovett-Silverman motion was

1 February 6th of 2008, which I -- which would make the deadline
2 the twenty -- I believe the 27th of February, 2008.

3 THE COURT: All right. I have a -- I have an
4 electronic order entered on July 23rd, granting motion for
5 extension of time to disclose experts. I don't have that in
6 front of me, the underlying motion, but I granted it. The
7 representation is that it was due three weeks after the
8 memorandum and order granting motion for summary judgment, or
9 the decision rather than that was February 6th. Again 21 days after
10 that is February 27th.

11 MR. HERMES: That's my understanding, your Honor, the
12 motion did request a three-week extension.

13 THE COURT: All right. Now, Mr. Meltzer, what you're
14 talking about is a pretrial filing that you made, not signed by
15 the witness that was filed on May the 2nd; is that right?

16 MR. MELTZER: No, we're talking about an actual
17 document entitled "Expert Witness Disclosure."

18 THE COURT: All right. What document is that?

19 MR. MELTZER: I believe it was in June of 2007. It
20 was way back. I think it was in time for the first -- the
21 first deadline.

22 THE COURT: Was it filed with the court, or was it
23 simply provided to me?

24 THE CLERK: Eighty-one.

25 THE COURT: Eighty-one. Disclosure pursuant to

1 Rule 26 by Landworks Creations, LLC.

2 All right. Do you have a -- Marty, do you have that?

3 THE CLERK: Yeah.

4 THE COURT: Why don't you print it out and let me look
5 at it.

6 All right. I'll try to be quick in light of the hour.
7 I'm looking at document No. 81, which is plaintiff Landworks,
8 LLC's expert disclosure pursuant to Rule 26(a)(2) in which it's
9 a document signed by Mr. Meltzer, which indicates that Mr.
10 Gallagher has published no articles, has not testified as an
11 expert witness before. His fee for producing his report was
12 \$125 per hour. The amount of number of hours required is not
13 set forth; and therefore, his full compensation is not
14 concluded. And, of course, it's not signed by Mr. Gallagher.

15 I find that the filings do not comply with
16 Rule 26(a)(2)(B). The question is whether under the
17 circumstances I can forgive the failure. While I'm tempted to
18 exclude the report in its entirety, because I see no good cause
19 for the failure, it's simply, as near as I can tell, a sloppy
20 or negligent -- the reason is sloppiness or negligence, as
21 opposed to any particular cause for failure to adhere to the
22 rule. Because I don't think there is any particular prejudice
23 to USF & G, I'm not going to exclude it. I will deem these
24 documents taken together as the expert report, although I am
25 going to order that Landworks provide USF & G with the total

1 amount of compensation of the study and expect the testimony to
2 be provided forthwith.

3 Let me turn then to the substance of Mr. Gallagher's
4 proposed testimony, which it's not clear to me whether any of
5 this testimony is relevant to the contract claims, as opposed
6 to the 93A or 176D claims.

7 Essentially, it's as we indicated, it's the custom and
8 practice in the industry what Lovett-Silverman did, and to some
9 extent what USF & G did, or what Lovett-Silverman did as
10 USF & G's agent, and whether or not that was a pattern or a
11 practice in the industry, or rather -- rather, whether it
12 complied with the industry standards. So, I don't see how this
13 is relevant to the trial of the contract claims.

14 Mr. Meltzer.

15 MR. MELTZER: No, it's not under the 93A/176D portion,
16 your Honor.

17 THE COURT: All right. So I will, to that extent, I
18 will exclude the testimony of Mr. Gallagher from the jury trial
19 portion of it, and we'll leave for another day the question of
20 the 176D and 93A issue.

21 And lastly, we have the motion to disqualify George
22 Byl -- Byl --

23 MR. MELTZER: Byl.

24 MR. HERMES: Byl, your Honor.

25 THE COURT: -- brought by Landworks. Mr. Byl is an

1 expert witness for USF & G.

2 Mr. Meltzer.

3 MR. MELTZER: Your Honor, we've provided a copy of his
4 report. As you can see, what he is essentially doing is he
5 is usurping the role of the jury. He has no personal
6 knowledge. His entire testimony is going to be based upon
7 reviewing the documents and weighing the credibility and
8 deciding who's right and who's wrong. That is the jury's role.
9 He has -- at this point, his conclusions are expressly that.
10 He intends to testify to what he thinks the jury ought to find
11 as a matter of fact.

12 He is not testifying as to anything that is relevant
13 on the issue of contract. He's not testifying to anything that
14 goes to a direct relative issue of practice in the industry
15 that would have any relevance to explain the counterclaim. It
16 is simply him assessing the evidence and his conclusion as
17 saying how the jury should move with it is absolutely not
18 admissible.

19 THE COURT: Well, to the extent that his -- his
20 opinion is not based on personal knowledge, I mean that's close
21 to 100 percent of all experts don't have personal knowledge
22 almost by definition. I mean they have to review some body of
23 evidence or other data to reach their conclusion.

24 MR. MELTZER: The deficiency here, your Honor, is that
25 as identified in the -- in the complaint -- in the discovery in

1 this case that USF & G and Lovett-Silverman never made an
2 inquiry into a substantial number of issues. They never went
3 to the individuals to have the best evidence to testify, but
4 what Mr. Byl is doing in his report is he is looking at the
5 discovery in this case in a vacuum; and essentially instead of
6 having Jackson or Standen or CTM, or Lamoureux Pagano testify,
7 he is essentially synthesizing their testimony, weighing it in
8 reaching conclusions. That's not just lack of personal
9 knowledge. That's somebody supplanting the role of the jury,
10 and his report is clear on that.

11 Even in his conclusions, if you look at how he arrives
12 at them, he is essentially redundant to the people, who are
13 there and who have personal knowledge. There's nothing here to
14 help the jury understand the contract or anything else. That
15 is left as best evidence to the witnesses who were there.

16 THE COURT: Well, I -- I mean what he says essentially
17 is, you know, this is my estimate of how much it -- well, it
18 would cost to correct work that I -- that he considered
19 defective and how much it would cost to finish work that was
20 reported to be unfinished. Of course, you can cross-examine
21 him and attempt to undermine his conclusions on the grounds
22 that, you know, he wasn't there, he didn't look at anything,
23 he, you know, took someone's word for something that turns out
24 not to be true. I mean you can --

25 MR. MELTZER: And, your Honor, he does not know what

1 the scope is. He's basically going to testify the work was
2 defective. It has not been established to be Landworks' work,
3 and my concern is there is going to be a witness here, who is
4 called as an expert in front of a jury, testifying as to the
5 scope when that testimony is left to those people first. There
6 is no testimony as to what that scope is, and the witnesses are
7 being provided by USF & G. So, he is essentially surmising and
8 then trying to assess values. If there are issues that are
9 defective, then the replacement contractor is the person to
10 testify to that. If there's work within the scope that wasn't
11 done, that's Jackson or Standen or Lovett-Silverman. That's
12 not George Byl to say this was Landworks' scope, and oh, by the
13 way, this work was defective; oh, by the way, this is what it's
14 worth. That is the ambit of the other witnesses in this case.
15 It's a synthesis expert. That's what he does.

16 We have in other cases in front of Judge Hillman, we
17 have a similar situation where he simply synthesizes what's out
18 there. My point is that that testimony is left to the people
19 with personal knowledge. It's not expert testimony. There are
20 witnesses who can testify to this and should be testifying to
21 this.

22 THE COURT: All right. I'm going to deny the motion
23 to disqualify or exclude him. It may be that there is some
24 wrinkle on this. Like any expert report, it's based on
25 assumptions, the data, the expert report, if for some reason it

1 turns out that it's based on some inappropriate data in some
2 respect, we can look at it at that point, and --

3 MR. MELTZER: Your Honor, may I suggest that prior to
4 his being put on the stand that out of the presence of the
5 jury, the court explores that issue with Mr. Byl. I think he
6 will ascertain that he is going to be testifying as to what he
7 has read. I think upon that, I think that before it prejudices
8 the jury, the court should consider whether he's going to add
9 anything to this trial.

10 THE COURT: Well, I will consider a voir dire at an
11 appropriate time, but I have to say that the mere fact that he
12 has looked through the file and has rendered an expert report
13 about what these items are and how much it would cost, I find
14 not even slightly surprising or shocking; and of course, you're
15 free to say that, you know, with respect to items A, B, C, D
16 and E that, in fact, Landworks was not responsible for, and
17 that he's simply dead wrong, but we'll -- we'll take that up
18 as -- at an appropriate time.

19 MR. MELTZER: Well, your Honor, may I ask that
20 we -- that that be asserted that it be taken up prior to him
21 taking the stand. If there is no foundation testimony to
22 support this that, in fact, he will not be included and allowed
23 to testify. If he is put in as a sole fact witness here, I
24 think that's a problem.

25 THE COURT: He's not a fact witness. He's an expert

1 witness, and an expert can testify or can base his opinions on
2 data that is not admissible or not admitted in the trial. I
3 mean my concern is not that, but if, for example, I rule that
4 the contract covers only X and Y, and not Z, I won't let him
5 opine about Z, but I can't tell that until we get farther into
6 the case. So, I'm going to deny it without prejudice to its
7 renewal at least in part at a later time; but based on what I
8 can see in the expert report, he's doing what experts do, which
9 is relying on data, disclosing the data, and rendering an
10 opinion as to the cost of work that's said to be defective and
11 the cost of work that's said to be unfinished, and --

12 MR. MELTZER: Your Honor, I think --

13 THE COURT: -- I'm not going --

14 MR. MELTZER: -- before he is allowed to testify to
15 the work, there has to be testimony that this is work that
16 belonged to Landworks and testimony from the parties that
17 prepares it that it was actually defective. I'm saying there's
18 no foundation for this. He's drawing off of documents upon
19 admission that nobody ever inquired as to the scope. He is now
20 taking it out to tell the jury what the scope is.

21 THE COURT: I said -- Mr. Meltzer, I said we would
22 revisit it at an appropriate time at the trial. Again,
23 if -- if there is no evidence that the contract covers Z, and
24 he testifies that Landworks didn't complete X, Y and Z, I'm not
25 going to let him testify as to Z; but just simply because you

1 dispute X and Y is not a reason to keep X and Y out of the
2 trial. And I can't tell at this point. I don't have enough
3 information in front of me. I'm certainly not going to exclude
4 it wholesale based solely on the representation that all he
5 did was, you know, look through the file and render an opinion.

6 MR. MELTZER: Your Honor, that's what he says he did.

7 THE COURT: All right.

8 MR. MELTZER: He's the one who was synthesizing.

9 THE COURT: All right. It's late. I've made my
10 ruling. We'll revisit it, need be it, at the trial.

11 All right. The plan, as I understand it, is we are
12 impaneling a jury on Friday, a week from tomorrow; is that
13 right?

14 MR. MELTZER: That's correct.

15 MR. HERMES: Correct, your Honor.

16 THE COURT: With the case to begin, evidence to begin
17 on Monday.

18 I do have a criminal trial going on now that I at
19 least have some concerns about whether we would be done in
20 time. I was assured by the government today that we would be.
21 I just warn you. It's hanging out there. Of course, we can
22 impanel while another jury is deliberating, but I'll -- stay in
23 contact with Mr. Castles to make sure you know the progress of
24 that case. It was supposed to go to the jury on Tuesday or
25 Wednesday, and at least there is some doubt in that regard.

1 This is the final pretrial conference. I'm not going
2 to see you again before we impanel. All right.

3 MR. HERMES: I believe there is certain deadlines for
4 submissions --

5 THE COURT: Yes.

6 MR. HERMES: -- at the close of business on Tuesday,
7 your Honor.

8 THE COURT: Yes. And because I don't have those
9 submissions, it's not clear to me whether there's something
10 else we ought to talk about, but let me just offer some
11 thoughts on empanelment.

12 And remind me, how many -- did I say it was going to
13 be eight or nine jurors?

14 MR. HERMES: I don't believe your Honor said.

15 THE COURT: I didn't rule?

16 MR. MELTZER: No.

17 MR. HERMES: I don't believe so, sir.

18 THE COURT: All right. We'll have eight jurors then.
19 Let's talk about how we're going to impanel. The jury panel
20 will be brought into the courtroom -- I don't know how many
21 people we'll have, but let's say there's 40 people. I will ask
22 the entire panel a number of questions concerning possible
23 issues of cause. To state some of the obvious ones, whether
24 they know the attorneys, whether they know the parties, whether
25 they're familiar with the project and so forth. For those

1 people who respond affirmatively, I'll call them up to sidebar,
2 examine them one by one. Counsel will be permitted to do brief
3 and respectful follow-up, if invited by the court. Once we
4 have eliminated everyone for cause, we will put eight jurors in
5 the box. They will be the -- you will have a randomized list.
6 So, they will be the first eight people on the list, who have
7 not been struck. In other words, you will know who is going to
8 go in the box, and you will know when you exercise the
9 peremptory who the next person on the list is.

10 So, for example, if I have struck jurors one and two
11 for cause, because they're counsel's best friends, we will put
12 jurors three through ten in the box, and the peremptories will
13 start then. And if one peremptory is exercised, say as to
14 Juror No. 3, we will put Juror No. 11 in the box and so on.

15 Peremptories will be exercised -- I think you're
16 entitled to three apiece. They will be exercised by rounds.
17 The plaintiff will go first in the first round. So it will go
18 plaintiff, defendant, plaintiff in the first round; defendant
19 plaintiff, defendant in the second round.

20 Again, you will know who is next up on the list.
21 There are no backstrikes, that is, if you've had an opportunity
22 to pass on someone, and you haven't taken it, you've lost the
23 opportunity to challenge the person in the future.

24 So, to get back to my hypothetical, we put jurors
25 three through ten in the box. The plaintiff challenges Juror

1 No. 3; the defendant challenges Juror No. 4, and say that
2 they're satisfied, we will replace jurors 3 and 4, and the next
3 round of challenges may only be to the jurors who are now
4 replacing 3 and 4, which I think are 11 and 12. Okay.

5 Any questions in that regard?

6 Mr. Meltzer.

7 MR. MELTZER: No questions, your Honor.

8 MR. HERMES: None, your Honor.

9 THE COURT: We will, as I indicated, impanel only on
10 Friday. Typically, the jury watches a video, or the jury
11 panel. It's about 20 minutes to 10:00 by the time they are
12 done with that. With only eight jurors, I would guess we'll
13 probably be done at 12:00 or 12:30, depending on what happens
14 with this criminal case and kind of how all that plays out.
15 One scenario that's possible, for example, is that we have
16 closing arguments in that case, and the jury empanelment
17 doesn't begin until that's done, you know, 11:00 or 11:30. I
18 just don't know. I have to see how the case goes, but I would
19 like to have the jury impaneled that Friday.

20 And at that time we can talk about whatever else needs
21 to be done. I am supposed to be in Boston Friday afternoon at
22 three o'clock, so I'm going to need to leave here no later than
23 2:00. So, that's another sort of piece of this puzzle that's
24 hanging out there. But, again, stay in touch with Mr. Castles;
25 and if there is a problem, we'll let you know.

1 MR. HERMES: I'm sorry. You're referring to a week
2 from tomorrow?

3 THE COURT: A week -- yes, I'm sorry. I think now I'm
4 confused as to whether I need to be in Boston tomorrow or a
5 week from tomorrow.

6 (The clerk conferred with the court.)

7 THE COURT: Tomorrow. All right. So it may not be a
8 problem. It's late in the day. I'm having trouble keeping my
9 thoughts straight.

10 We theoretically have electronic capability in this
11 courtroom and a document camera. As you can see by the
12 equipment, it's not working right now. It's supposed to be
13 fixed this weekend. So be forewarned. Although we have it,
14 it's at least possible it may not be working.

15 And, I guess, let me ask you: Do you have any
16 questions about presentation of the evidence or how you are to
17 conduct yourself during the trial?

18 Mr. Meltzer.

19 MR. MELTZER: No.

20 MR. HERMES: No, your Honor.

21 THE COURT: All right. And if something occurs to
22 you, we can try to take that up when we impanel.

23 Okay. Anything else while I have you here?

24 MR. HERMES: No, your Honor.

25 MR. MELTZER: No, your Honor.

1 THE COURT: All right. I will see you then a week
2 from tomorrow barring any unforeseen development in the case
3 pending.

4 All right. Thank you.

5 MR. HERMES: Thank you, your Honor.

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7 (At 6:12 p.m., court was adjourned.)
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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript, consisting of 49 pages
inclusive, is a true and accurate transcription of my
stenographic notes in Case No. 05cv40072, Landworks Creations,
LLC versus United States Fidelity and Guaranty Company, before
F. Dennis Saylor, IV, on May 7, 2008, to the best of my skill,
knowledge, and ability.

/s/ Marianne Kusa-Ryll

Marianne Kusa-Ryll, RDR, CRR

Official Court Reporter